

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: January 16, 2014

Opposition No. 91211687

River Light V, L.P.

v.

Anne Sophie, Inc. dba Emperia

Cheryl S. Goodman, Interlocutory Attorney:

On October 30, 2013 the Board set aside notice of default and accepted applicant's answer. On November 26, 2013, opposer filed a motion for reconsideration and response to applicant's motion to set aside default. Essentially, opposer complains that the Board entered the October 30, 2013 order prematurely by setting aside default prior to opposer's deadline for responding to applicant's motion.¹

A request for reconsideration under Trademark Rule 2.127(b) provides an opportunity for a party to point out any error the Board may have made in considering the matter initially. The motion should be limited to a demonstration that based on the facts before it and the applicable law,

¹ No response to reconsideration was filed by applicant.

the Board's ruling is in error and requires appropriate change. TBMP § 518 (3d. ed. rev. 2013).

The Board agrees that the order setting aside default was granted prematurely in that opposer did not have an opportunity to oppose the motion.

Accordingly, reconsideration is granted.

The Board will now consider opposer's arguments in response to applicant's motion to set aside default.

The standard for determining whether to set aside default is good cause. Fed. R. Civ. P. 55(c). Good cause is established when it is shown that the late filing was not the result of willful conduct or gross neglect, that acceptance of the late answer would not prejudice the opposer, and that applicant has a meritorious defense to the action. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). When considering these factors, the Board keeps in mind that the law strongly favors determination of cases on their merits. *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r Pat. 1990).

Meritorious Defense

Opposer conclusorily argues that applicant does not have a meritorious defense, pointing to its notice of

opposition. However, applicant points to the filing of its answer as sufficient to establish a meritorious defense.

The Board finds that applicant has set forth a meritorious defense by the filing of its answer. See *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (plausible response to allegations in notice of opposition all that required for meritorious defense); *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 993 (E.D.N.Y. 1995) ("A meritorious defense is established by Rule 55 standards by setting forth denials and defenses in an answer"). The Board notes in particular, applicant's "affirmative defenses,"² which state that the parties' marks are not confusingly similar for likelihood of confusion or sufficiently similar for dilution.

Prejudice

Applicant argues that opposer will not be prejudiced by the six-week delay as opposer has not incurred any expenses by the late filing by applicant of its answer. Opposer, on the other hand, argues that it will be prejudiced if default is set aside as it will be subject to

² Affirmative defenses nos. 5, 6 and 7 are amplifications of applicant's denials and not true affirmative defenses.

additional fees and delay if the opposition is allowed to proceed.

With regard to the question of prejudice, substantial prejudice within the meaning of Rule 55(c) does not result from delay alone. Rather, the plaintiff must demonstrate that the default caused some actual harm to its ability to litigate the case, such as diminishing the amount of available evidence, increased difficulties of discovery, or the thwarting of plaintiff's recovery or remedy. 10 C. Wright, A. Miller, M. Kane & R. Marcus, Federal Practice and Procedure Civil 3d Section 2699 (2009). Merely being forced to litigate on the merits cannot be considered prejudicial for purposes of setting aside a default judgment.

Opposer has failed to identify any actual harm that will result from setting aside default such as difficulties in discovery or the thwarting of its recovery or remedy. Delay alone does not result in substantial prejudice within the meaning of Rule 55(c), and the incurring of money and costs in this matter do not constitute substantial prejudice. *Capital Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 394 (D.D.C. 2005) (It is well established, however, that "delay and legal costs are part and parcel of

litigation and typically do not constitute prejudice for the purposes of Rule 55(c)").

In view thereof, the Board finds no prejudice to opposer in setting aside default.

Willfulness

Applicant argues that its default was not willful as it did not receive notice of the opposition proceeding until receipt of the notice of default. To support this statement, applicant has provided a declaration from James Li, principal of applicant, who declares that he personally looked into the matter and could not determine the reason for non-receipt of the notice of opposition, but if the notice of opposition had been received, applicant would have filed an answer. Applicant also submitted the declaration of counsel, who also declares that he was informed that applicant did not receive notice of the proceeding until issuance of the notice of default.

In response, opposer argues that it is implausible that applicant did not receive the notice of opposition given that applicant has received other documents mailed to it by opposer and the Board at its address of record. Opposer also points to applicant's awareness of opposer's filing of extensions of time to oppose the involved application, and the parties' settlement discussions prior

to the filing of the notice of opposition as well as applicant's involvement in another opposition involving the same application as evidence of applicant's willful failure to answer. Lastly, opposer points to applicant's failure to check whether a proceeding had been filed against its application as demonstrating willful or gross neglect.

The Board finds nothing in the record clearly establishes that applicant had knowledge of the existence of the opposition and that applicant deliberately chose not to respond. As to applicant's failure to check Office records as to whether an opposition had been filed, the Board finds that this failure, while careless, is not sufficient to establish gross neglect.

Under the circumstances, the Board finds that applicant's default was not willful.

The Board finds that all three factors weigh in favor of granting applicant's motion to set aside default. Moreover, all doubts must be resolved in favor of those seeking relief under Rule 55(c).

Accordingly, the Board's order of October 30, 2013 setting aside default and accepting applicant's answer stands.

Dates in this proceeding are reset as follows:

Deadline for Discovery Conference

2/6/2014

Discovery Opens	2/6/2014
Initial Disclosures Due	3/8/2014
Expert Disclosures Due	7/6/2014
Discovery Closes	8/5/2014
Plaintiff's Pretrial Disclosures	9/19/2014
Plaintiff's 30-day Trial Period Ends	11/3/2014
Defendant's Pretrial Disclosures	11/18/2014
Defendant's 30-day Trial Period Ends	1/2/2015
Plaintiff's Rebuttal Disclosures	1/17/2015
Plaintiff's 15-day Rebuttal Period Ends	2/16/2015

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.